JURISDICTION

The judgment of the Court of Appeals (Pet. App. 13a) was entered on January 27, 1972. The petition for a writ of certiorari was filed on April 26, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals correctly held that a party which was not a creditor or stockholder of the debtor railroad and did not seek permission to intervene in the reorganization proceedings was not authorized under the provisions of Section 77 of the Bankruptcy Act to appeal the entry of an order of the Reorganization Court.

STATUTES INVOLVED

The relevant provisions of Sections 77(b) and 77(c)(13) of the Bankruptcy Act, 11 U.S.C. 205(b) and 205(c)(13), are set forth at page 3 of the petition.

STATEMENT

Petitioner, the New York, New Haven and Hartford Railroad Company First Mortgage 4% Bondholders Committee (the "New Haven Committee") is the representative of the first mortgage bondholders of The New York, New Haven and Hartford Railroad Company (the "New Haven"). The New Haven is and has been a debtor in reorganization under Section 77 of the Bankruptcy Act since July 7, 1961.

As a condition to approval by the Interstate Commerce Commission (the "Commission") of the merger of the Pennsylvania Railroad Company and the New York Central Railroad Company into what is now the Penn Central Transportation Company (the "Penn Central"), the Commission required the inclusion of the New Haven

in the merged system, and substantially all of the assets and operations of the New Haven were sold to the Penn Central on December 31, 1968. See *New Haven Inclusion Cases*, 399 U.S. 392 (1970). In addition to cash and Penn Central stock, a part of the consideration paid to the New Haven Trustee was an issue of Penn Central 5% Divisional First Mortgage Bonds, which were secured by a Divisional First Mortgage on all the New Haven assets transferred to the Penn Central. As approved by the United States District Court for the District of Connecticut (the "New Haven Reorganization Court"), the transfer of the New Haven's assets to Penn Central was to be substantially free and clear of all liens and encumbrances, with the liens and encumbrances shifting from the assets themselves to the proceeds of the sale, as authorized by Section 77(o) of the Bankruptcy Act, 11 U.S.C. 205 (o).

The Penn Central itself filed for reorganization on June 21, 1970, in the United States District Court for the Eastern District of Pennsylvania (the "Penn Central Reorganization Court").

After extended negotiations, the Penn Central Trustees agreed to sell part of the former New Haven line in New York State to the Metropolitan Transportation Authority (the "MTA") and to lease some former New Haven lines in Connecticut to the Connecticut Transportation Authority (the "CTA"). On September 11, 1970, the Penn Central Trustees filed a petition requesting authority to affirm the Memorandum of Intent between the Penn Central Trustees and MTA and CTA. At a hearing on the petition held by the Penn Central Reorganization Court on September 23, 1971, the New Haven Trustee and the New Haven Committee appeared and objected to the conveyances contemplated by the Memorandum of Intent unless the Penn Central Trustees deposited with the Indenture Trustees of the Penn Central Divisional First Mortgage an amount in cash equal to the fair value of the properties transferred, not simply the cash which Penn Central was to receive in direct

payment for the transfer. After some discussion, the hearing was recessed to allow the parties to effect a compromise.

A settlement agreement was reached among all the parties except the New Haven Committee and was reflected in Order No. 63 of the Penn Central Reorganization Court dated September 29, 1970, which authorized the Penn Central Trustees to affirm the Memorandum of Intent, but reserved jurisdiction to determine the valuation and disposition of the consideration to be received by the Penn Central Trustees from the MTA and CTA. (Pet. App. 15a-16a) Order No. 72, amending Order No. 63, dated October 27, 1970, made it clear that the New Haven Committee did not consent to the entry of Order No. 63, but also stressed that by consenting to the amendment, neither the Trustees nor any other party would be deemed to have agreed that the New Haven Committee ever had standing to object to the entry of Order No. 63. (Pet App. 17a) The transaction was consummated early in January, 1971, and the cash paid by MTA and CTA was deposited with the Indenture Trustees of the Penn Central Divisional First Mortgage. By Order No. 147 of the Penn Central Reorganization Court dated January 26, 1971, which was approved by the New Haven Reorganization Court on January 27, 1971, the Penn Central Trustees and the New Haven Trustee were authorized to divide approximately $18 million held by the Indenture Trustees, which included the deposits made pursuant to Order No. 63.

The New Haven Committee filed its notice of appeal to the Court of Appeals on October 23, 1970, but did not seek either a stay of execution from the Penn Central Reorganization Court or a supersedeas from the Court of Appeals.

On March 3, 1971, the Penn Central Trustees filed a motion to dismiss the appeal of the New Haven Committee on the ground that it lacked standing to appeal.

On May 4, 1971, the motion was continued for disposition by the panel hearing the merits of the appeal. After briefs and oral argument by counsel for the New Haven Committee, the Penn Central Trustees and MTA, the Court of Appeals dismissed the appeal, concluding that "the New Haven Committee is not authorized by the controlling bankruptcy statutes to prosecute this appeal." (Pet. App. 5a)

ARGUMENT

The New Haven Committee advances two arguments in support of its petition: (1) that the Court of Appeals erroneously limited the principles enunciated by this Court in *Data Processing Service* v. *Camp*, 397 U.S. 150 (1970); and (2) that the Court of Appeals erroneously limited the definition of "creditor" under Section 77 of the Bankruptcy Act. Both arguments are completely lacking in merit.

Petitioner's reliance on the *Data Processing Service Case* is clearly misplaced. This Court made it clear that the principles enunciated in that case in favor of granting judicial review did not apply where a presumption against judicial review "is fairly discernible in the statutory scheme." (397 U.S. at 157) As this Court pointed out, "Congress can, of course, resolve the question one way or another, save as the requirements of Article III dictate otherwise. *Muskrat* v. *United States*, 219 U.S. 46." (397 U.S. at 154) In Section 77(c)(13) of the Bankruptcy Act, 11 U.S.C. 205(c)(13), Congress *has* specified the persons granted the right to be heard, and there is no constitutional question being raised in this case with regard to that section. The Court of Appeals was clearly correct in holding that the language in the *Data Processing Service Case* "was manifestly not intended to apply to a railroad reorganization proceeding." (Pet. App. 6a, footnote 12)

So far as the New Haven Committee is concerned, it would have the right to be heard only if it could properly

be considered as a "creditor or stockholder" or an interested party which has been permitted to intervene. Clearly, it does not qualify under any of the three categories. The New Haven Committee has not sought permission to intervene in the Penn Central reorganization proceeding, and the stock paid by Penn Central as part of the purchase price for the New Haven's assets is being held by the New Haven Trustee. The New Haven Committee is also clearly not a "creditor" holding a claim "against the debtor or its property" under the provisions of Section 77(b), 11 U.S.C. 205 (b).

As the Court of Appeals correctly pointed out, the transfer of the New Haven's assets to the Penn Central was made free and clear of the mortgage lien, with the lien attaching to the proceeds to be held by the New Haven Trustee, and the bondholders represented by the New Haven Committee thus have a lien on substantially all of the assets held by the New Haven Trustee. The New Haven Committee, however, is clearly not a "creditor" or "stockholder" of the Penn Central, as those terms are used in the Bankruptcy Act. (Pet. App. 6a-7a)

After satisfaction of the higher-priority claims such as administration expenses, trustees certificates, tax claims, etc., there will presumably be something left over in the New Haven estate for the bondholders represented by the New Haven Committee, so that it does have a "derivative interest" as the Court of Appeals found. (Pet. App. 7a) Such a derivative interest, however, clearly does not give the New Haven Committee standing to bring this appeal as a "creditor" or "stockholder" of the Penn Central.

The New Haven Committee did, of course, have an opportunity to challenge the involved transaction in the New Haven Reorganization Court, where it *is* a party. It could have asked that Court to prevent the New Haven Trustee from agreeing to the settlement, and it could have objected to the order permitting the division of the proceeds between the Penn Central Trustees and the New Haven Trustee. Instead, it stood mute. In now trying to

improve the terms of the transaction after the deal has been consummated and the proceeds distributed, the New Haven Committee has neither law not equity on its side.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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